In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1296

AMERICAN SMELTING AND REFINING COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 406 F. 2d 552. The Board's decision and order (Pet. App. 10a-14a) are reported at 167 NLRB No. 26.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1969 (Pet. 2; Pet. App. 6a-9a). The

petition for a writ of certiorari was filed on April 21, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that rental of company-owned housing was a "condition of employment" at the company's nearby mine, so that the company should not have raised the rents for such housing without first bargaining with the employees' union representative.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 591, 29 U.S.C. 151, *et seq.*) are set forth at pages 2-3 of the petition.

STATEMENT

1. The petitioner-company operates a copper mine and related facilities at Silver Bell, Arizona, 40 miles from Tucson. In 1951, at the same time that it started its mining operations at Silver Bell, the company began the construction of a townsite there. The first houses were occupied in 1952. The town presently consists of 175 two- and three-bedroom homes, 24 apartment units, and 50 trailer sites, as well as a grocery store, church, barber shop, post office, and service station. (Pet. App. 17a-18a.)

As of October 12, 1966, the Company employed 317 persons at Silver Bell, 264 of whom were production

and maintenance workers represented by the union (Pet. App. 18a).[1] Of these 264, 165 (approximately 65 percent) lived in the company housing at Silver Bell, as did 33 salaried employees not in the unit.[2] Most of the remaining 89 employees in the bargaining unit lived in Tucson, and a few lived in the intermediate communities of Marana and Cortaro, which are approximately 25 miles from the Silver Bell mine. (Pet. App. 18a.)

Although no employee is required by the company to live in its houses, they were all occupied at the time of the Board hearing and there is usually a waiting list. Employees enter into written leases with the company and their rent is paid by deduction from their pay. Prior to September 1, 1966, the rental price was $45.00 for a two-bedroom house and $50.00 for a three-bedroom house, including utilities (paid by the company). The residences and the townsite are maintained by other company employees. Tenants were usually requested to vacate when the worker's employment terminated. (Pet. App. 19a.)

On July 22, 1966, the company sent a letter to each of its tenants announcing that, effective August 1, the rent would be increased $5 and $10 respectively on two- and three-bedroom houses. This was the first rent increase since the houses were opened in 1952.

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[1] Local Union 13886, International Union of District 50, United Mine Workers of America.

[2] Five or six individuals not employed by the company also occupy company housing—the barber, the minister, the grocery clerk, and a few employees of a subcontractor (Pet. App. 18a).

The union was not consulted prior to this decision to raise rents. (Pet. App. 19a-20a.)

Shortly after the raise was announced, union representatives advised the company that any increase in rents would have to be negotiated. Company officials replied that rentals were not a bargaining matter and were "none of the Union's business" (Pet. App. 19a; Tr. 46). At a subsequent meeting on August 17, 1966, the Company again refused to bargain about the rent increases, and the new rentals went into effect on September 1, 1966 (Pet. App. 20a).

2. The Board held that, in the circumstances of this case, the company housing had a substantial and material effect on the employees' conditions of employment; that the rent for such housing therefore was a mandatory subject of collective bargaining; and that the company had violated Section 8(a)(5) and (1) of the Act by raising rents without first bargaining with the union (Pet. App. 11a, n. 1.) The Board ordered the company to cease and desist from unilaterally increasing the rents for its housing without prior notification to, and bargaining with, the union; to reinstate the rental charges in effect prior to the unilateral increases; to make whole all employees in the unit who paid the increased rental charges; and to post appropriate notices (Pet. App. 12a, 40a-41a).

The court of appeals enforced the Board's order. It stated: "We think that the determination whether the rental of company housing constitutes a 'condition of employment' within the meaning of Section 9(a) of the Act depends upon an evaluation of the relevant facts of the particular case" (Pet. App. 3a). The

court held that the Board was justified in concluding, on the facts of this case, that company housing was a "condition of employment" (Pet. App. 5a).

ARGUMENT

1. Petitioner apparently concedes (Pet. 2) that where company housing "materially and substantially affects the terms and conditions of employment" it may be a mandatory subject of bargaining. It contends, however, that there is no "substantial evidence in the record" to sustain such a finding in this case. An issue of this kind, which turns on the particular facts, is properly left to resolution by the court of appeals, not this Court. See *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503.

In any event, the record supports the Board's finding that the company housing here materially affected the terms and working conditions of the company's employees. As the court below noted: "Silver Bell itself is located at the end of a gravel road, twenty miles from the nearest main road * * * the nearest private housing is about twenty-five miles away, two-thirds of the union members live in the company housing, there is a waiting list for the housing, the rent has not been raised in the past twelve years, and public transportation is apparently not readily available" (Pet. App. 4a).

2. Contrary to petitioner's contentions (Pet. 9-13), there is no conflict of decisions. The facts of the present case are similar to those in *National Labor*

Relations Board v. *Lehigh Portland Cement Co.*, 205 F. 2d 821, where the Fourth Circuit upheld the Board's conclusion that company housing constituted a condition of employment. Although the Fifth Circuit, in *National Labor Relations Board* v. *Bemis Bros. Bag Co.*, 206 F. 2d 33, reached a contrary result, the court there merely found "the record insufficient in facts to authorize the Board's conclusion *in this case.*" 206 F. 2d at 35 (emphasis added). As the court below explained in distinguishing *Bemis Bros.*, in that case "the company plant and housing were on the edge of a town of thirteen thousand. Only about a third of the employees lived in the company houses, and housing and public transportation were available" (Pet. App. 4a).

The other cases cited by petitioner are wholly inapposite. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, involved the question whether there was a duty to bargain over the subcontracting of certain work, and *Westinghouse Electric Corp.* v. *National Labor Relations Board*, 387 F. 2d 542 (C.A. 4), involved the duty to bargain over the prices charged by an independent contractor operating cafeterias in the company's plants.[3]

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[3] Petitioner's contention (Pet. 13-15) that employer-owned housing is not a subject which lends itself to the processes of collective bargaining rests in part on the erroneous premise that there are no arbitration awards dealing with company housing. In fact, there are such awards; see, *e.g.*, *Columbian Carbon Company*, 67-1 Labor Arbitration Awards 8314. To be sure, the company-housing cases are less numerous than those dealing with subcontracting, the subject involved in *Fibreboard, supra.* This paucity, however, is more reasonably

3. Finally, there is no substance to petitioner's contention (Pet. 16-18) that the Board based its decision on "unsupported presumptions and guesses." In view of the undisputed facts that there had been no increase in the rents of the company houses for many years, that over two-thirds of the unit employees lived in such houses, that there was a continuous waiting list, and that the nearest other housing was 25 miles away, the Board acted reasonably in inferring that the availability of company housing constituted a direct advantage to the employees in fulfilling their employment duties. An administrative agency like the Board "may infer * * * from the proven facts such conclusions as reasonably may be based upon the facts proven." *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 800.

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attributed to the small amount of company housing still in existence—not to be inappropriateness of that subject for collective bargaining.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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